



The Comptroller General  
of the United States

Washington, D.C. 20548

*Cham*

## Decision

Matter of: Union Natural Gas Company  
File: B-224607  
Date: January 9, 1987

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### DIGEST

1. General Accounting Office will consider a protest by a potential subcontractor of a prime contractor that is providing large-scale management services to support an Air Force base, since the contractor has ongoing purchasing responsibility and none of the parties disputes that it is acting "for" the government in this capacity.
2. Decision to cancel a request for proposals after proposal due date is appropriate when inability of prime contractor, acting for the government, to reach agreement with proposed subcontractor reveals solicitation deficiencies necessitating a reconsideration of the minimum requirements of the government.

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### DECISION

Union Natural Gas Company protests the cancellation of request for proposals (RFP) No. 1213, issued April 28, 1986 by Northrop Worldwide Aircraft Services, Inc., the Air Force's operations and maintenance contractor for Vance Air Force Base, Enid, Oklahoma. The solicitation called for the furnishing of natural gas to the base. Northrop canceled the solicitation when it was unable to agree with Union on contractual terms and conditions. Union contends that Northrop did not negotiate in good faith and improperly rejected its offer.

We deny the protest.

Northrop has contracted to provide operation and maintenance services at Vance Air Force Base; its responsibilities include utility contracts. Through a competitive

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solicitation to meet the base's natural gas requirements, Northrop hoped to obtain a supply of natural gas at deregulated prices. The RFP provided technical specifications for the gas as well as some general contract provisions, including Northrop's right to terminate the contract upon 90 days notice. The RFP stated that all contract provisions would be negotiated, and it requested offerors to provide proposed terms and conditions in specific areas such as change-of-rates, price escalation, construction charges, and termination liabilities, as well as details of any other provisions considered to be important. The RFP provided that award would be made to the technically qualified offeror whose proposal offered the lowest base year price for the government's estimated gas consumption.

Northrop received several proposals by the May 28 due date, including one from Union. Union proposed to construct a natural gas pipeline to the base and to recover its construction costs through a minimum annual lease charge for 10 years. Northrop concluded that Union was the apparent low offeror and suggested to the firm that its proposed contract should be condensed and that the proposed lease charge should be included in the price of the natural gas. In response, Union submitted a revised offer that proposed a minimum annual service charge for 10 years instead of a pipeline lease.

According to Northrop, it found a number of problems in Union's revised proposal, many of which had been in the initial proposal but had not been discussed with Union. The problem that apparently gave Northrop the most concern, the proposed minimum annual charge, was raised with Union, and Northrop asked if the firm would consider a connection charge of \$100,000 instead. Northrop then sent a proposed contract to Union containing the general provisions that had been in the solicitation, including Northrop's right to terminate upon 90 days notice.

Union considered a \$100,000 connection charge to be too low in light of its estimated pipeline construction costs of \$248,780. Consequently, on August 11, Union submitted a third proposal based upon a utility contract format in Supplement No. 5 to the Department of Defense Federal Acquisition Regulation Supplement (DOD FAR Supp.) entitled "Procurement of Utility Services."<sup>1/</sup> This proposal included

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<sup>1/</sup> The 1986 edition of the DOD FAR Supp. does not reprint the referenced supplement; instead it refers to Armed Services Procurement Regulation Supplement No. 5 (Oct. 1, 1974). 48 C.F.R. Chapter 2 at 5 (1985).

a termination liability of \$248,780 in the event the contract was terminated in less than 10 years. Northrop reports that the termination liability clause is unacceptable, and because of its inability to reach an agreement with Union as to pricing and contract structure, it elected to reject all proposals and cancel the solicitation.

Union contends that Northrop did not fairly consider its proposal and failed to negotiate in good faith. Union argues that its proposal should not have been rejected because it offered the lowest price for the base year and used the standard format for government utility contracts. Union also maintains that the problems and questions about its proposal listed by Northrop in the agency report were never raised with Union and that there was no discussion of Union's third proposal.

The agency maintains that the cancellation was reasonable because Union's proposed terms and conditions, particularly the \$248,780 termination charge, were unacceptable and did not represent the best interests or minimum needs of the government. The Air Force states that a lease of the pipeline currently being used is preferable to incurring additional costs for construction of a new pipeline, and that Northrop will resolicit upon determination of an acceptable contract format and requirements to meet the minimum needs of the government. The agency reports that in the meantime, it will procure gas from the incumbent contractor.

Our Office does not review the award of subcontracts by government prime contractors except in certain limited situations. One of the exceptions to our general policy is for those awards made "by or for" the government. 4 C.F.R. § 21.3(f)(10) (1986). Here, Northrop is responsible for furnishing management, equipment, personnel, and services to support Vance Air Force Base, including maintenance of all aircraft, simulators, componets, and associated ground equipment, performance of all civil engineering functions, and supply, data processing, transportation, telecommunications, and other services. The parties do not dispute that Northrop is providing large-scale management services to the government with on-going purchasing responsibility, and is thus acting "for" the government. See Ocean Enterprises, Ltd.--Reconsideration, B-221851.2, June 26, 1986, 65 Comp. Gen. \_\_\_, 86-2 CPD ¶ 10.

When we do review subcontract award protests, we do so to determine whether the procurement was consistent with and achieved the policy objectives of the "federal norm," i.e., the fundamental principles of federal procurement law as set

forth in the statutes and regulations that apply to direct federal procurements. Id.; Piasecki Aircraft Corp., B-190178, July 6, 1978, 78-2 CPD ¶ 10. The Competition in Contracting Act of 1984 specifically provides that all proposals received in response to a competitive RFP may be rejected if the agency head determines that such action is in the public interest. 10 U.S.C. § 2305(b)(2) (Supp. III 1985). In a direct federal procurement, only a reasonable basis is required for cancellation of a solicitation when negotiation procedures are used. Roth-Radcliffe Co., Inc., B-213872.2, June 1, 1984, 84-1 CPD ¶ 589. The same standard is applicable to government prime contractors. J.C. Yamas Co., B-211105, Dec. 7, 1983, 83-2 CPD ¶ 653.

Given the record before us, we find the cancellation proper. While a prime contractor is not obligated to continue discussions with an offeror whose proposal is found unacceptable, see Ellis & Watts, B-219360, Aug. 20, 1985, 85-2 CPD ¶ 202, the circumstances here involve more than proposal unacceptability. We view the inability of the parties to reach an agreement to be a result of Northrop's failure to decide in advance upon what basis it could contract for natural gas and how it would compare offers proposing differing methods.

Northrop concluded during discussions with Union that a termination liability provision would not be acceptable, yet the solicitation invited terms, including connection or termination liabilities if the offeror proposed to construct new distribution lines. While Supplement No. 5, § S5-108(b), provides that termination liabilities are ordinarily preferable to connection charges, agencies are not required to accept either approach in purchasing utilities. See id. § S5-103.2. We cannot say that Northrop's determination that it would not obligate itself to pay a termination liability was violative of any fundamental principle of procurement law. In the solicitation, Northrop asked offerors to specify any contractual provisions that they desired, yet it did not explain how offers on different bases would be evaluated. Offerors can compete on equal terms--a fundamental requirement in any government procurement--only if they know in advance the basis on which their proposals will be evaluated. Roth-Radcliffe Co., Inc., supra.

In our view, Northrop had a reasonable basis for canceling the solicitation in order to reconsider its minimum needs and correct the deficient solicitation. There is no indication in the record of bad faith on the part of contracting officials in making this decision. Rather, it is apparent from the record that Northrop did not discover the solicitation deficiencies until it encountered difficulties in reaching an agreement with Union.

Union alleges that Northrop discussed its proposal with a competitor. There is no evidence in the record other than Union's bare allegation that this occurred, and the protester did not respond to Northrop's denial of the charge, apparently abandoning this basis for protest. While Union also requests that we investigate this entire matter, including Northrop's subcontracting procedures, it is not our practice to conduct investigations pursuant to our bid protest function in order to establish the validity of a protester's assertions. Fugro Inter, Inc.--Reconsideration, B-219323.2, Dec. 13, 1985, 85-2 CPD ¶ 654.

Finally, Union requests proposal preparation costs as provided in our Bid Protest Regulations, 4 C.F.R. § 21.6(d). The statutory prerequisite for entitlement to proposal preparation costs--a finding that a federal agency did not comply with a statute or regulation, 31 U.S.C. § 3554(c)(1) (Supp. III 1985)--is not present here.

Accordingly, Union's protest and its request for proposal preparation costs are denied.

*for* *Symon Efins*  
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